Supreme Court, U.S.
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No. 94-1267

In the Supreme Court of the United States
October Term, 1994

THOMAS C. PREVETIRE,

Petitioner,

v.

WEYHER/LIVSEY CONSTRUCTORS, INC., ET AL.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER IN OPPOSITION TO FEDERAL RESPONDENT AND EMPLOYER RESPONDENT

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QUESTION PRESENTED

Whether an employee involved in the construction of a steam and electrical power plant, whose primary purpose was to provide power for ship repair work at the Norfolk Naval Shipyard, is a "maritime employee" under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901 et seq.?

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REPLY BRIEF FOR PETITIONER

Thomas C. Prevetire, by counsel, respectfully submits this REPLY BRIEF in opposition to the brief of the Federal Respondent, Solicitor General, Department of Justice, filed on March 29, 1995, and the brief of the Employer/Carrier Respondents, Weyher/Livsey Constructors, Inc., et al., filed on February 24, 1995.

ARGUMENT

I. Where the Fourth Circuit's decision was admittedly erroneous (by the Solicitor General) and it is clear that the decision will have a substantial impact on the future administration of the LHWCA, review by this Court is therefore warranted.

The Federal Respondent, the Solicitor General, accurately summarizes the erroneous decision made by the court of appeals below, however, to say that the decision below will not affect the future administration of the LHWCA is clearly wrong. The Fourth Circuit's decision will, indeed, have a significant impact on the administration of the LHWCA.

Shipyards and cargo terminals throughout the United States are continually expanding--building new fabrication shops, maintenance shops, administration buildings, etc. As the industry grows, shipyards will continue in the expansion, improvement, and maintenance of their facilities. The decision of the court of appeals below will be used to argue that those employees involved in such expansion projects within shipyards are not covered under the LHWCA. Those people involved in the creation, construction, fabrication, or erection of those facilities within the shipyard will be denied coverage under the Act based upon the Fourth Circuit's decision below which was admittedly erroneous (by the Solicitor General).

In fact, the stringent standard established in the decision below is already being used to deny coverage to a class of obviously covered maritime employees in the very same shipyard in question here. This law firm has been

contacted by a number of injured employees, whose primary work involves the "maintenance" of the same power plant Prevetire was constructing at the Norfolk Naval Shipyard, and are being denied jurisdiction under the LHWCA by their employer on the basis of the decision below. This decision is being used to deny coverage in those cases, and certainly more will follow.

By the facts in this case, the decision below is not just limited to a power plant in a Naval shipyard. Since the Fourth Circuit does not limit its holding so narrowly to the facts of this case, it will undoubtedly be used as a standard for denying future claims involving jurisdictional questions, certainly within its own circuit and throughout other circuits in the United States. Aside from New York City, the Hampton Roads area in Virginia, which falls within the jurisdiction of the Fourth Circuit, comprises the second largest port on the East Coast. In this regard, the Fourth Circuit considers a large amount of longshore cases and its decisions have a substantial impact on the administration of the LHWCA throughout the United States. The Fourth Circuit's decision below will affect many future LHWCA claims despite the fact that the decision was admittedly erroneous.

The Solicitor General also argues that "[t]he coverage question in this case arises in an unusual setting (a naval facility building its own power plant) and should directly affect few workers" (Federal Respondent's Brief "Fed.Brf." at 13). The fact that the facility in question is located on a Naval base does not make the present situation any different from that involving the private sector. Employees working for private employers in Naval shipyards are equally subject to the jurisdictional requirements under the LHWCA as those employees working for private shipyards. This case does not

involve an unusual setting. Since there are already additional cases involving this particular facility, it is reasonable to assume that there will be additional cases involving other shipyards and maritime facilities with their own internal source of power. Given the size of shipyards and the extensiveness of their operations, it would not be surprising that there would be at least a secondary, if not a primary, source of power within the shipyard. For the Solicitor General to argue that the Norfolk Naval Shipyard is an "unusual setting" and therefore the decision below would not have a significant impact on the enforcement of the LHWCA, is clearly a faulty analysis. The fact is that the Fourth Circuit's decision is already affecting subsequent compensation claims, will continue to influence future claims, and therefore, review by this Court is warranted.

II. There is an implicit conflict between the decision below and this Court's decision in *Schwalb*, and therefore review by this Court is needed.

This is not a case of first impression, as suggested by the Solicitor General, and there is an implicit conflict between the decision below and this Court's decision in *Chesapeake & Ohio Ry. Co v. Schwalb*, 493 U.S. 40, 107 L.Ed.2d 278, 110 S.Ct. 381 (1989). This Court in *Schwalb* held that "aside from the specified occupations, land-based activity occurring within the § 903 situs will be deemed maritime only if it is an integral or essential part of loading or unloading a vessel." 493 U.S. at 45. In discussing the *Schwalb* decision pertinent to the present case, the Solicitor General correctly notes that the "integral or essential part" test extends to "the 'overall process of loading and unloading a ship'" (Fed.Brf. at 7; citing *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 82-83 (1979); *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 265-279 (1977)). The Solicitor

General then concludes:

> . . . If, as the Court held in *Schwalb*, the Act extends coverage to work that is essential to longshore operations, but is not longshoring itself, there is no reason to doubt that the Act also covers employment that is essential to other activities specified in the Act, such as shipbuilding and ship repair.
>
> This Court's understanding of the purpose of the 1972 amendments to the LHWCA also supports a finding of coverage when a land-based activity is essential to shipbuilding or ship repair. . . **Coverage of all land-based employees whose work is essential to shipbuilding and ship repair ensures that workers in those industries, like those in longshoring, will not lose LHWCA benefits merely because of technological changes in their industries.**
>
> (Fed.Brf. at 8-9) (emphasis supplied).

The Solicitor General's conclusions in this regard are correct. The proper test in determining coverage under the LHWCA is whether the claimant's activities were integral or essential to any of the activities specified in Section 902(3), including shipbuilding and ship repair. The Solicitor General accurately concludes that under this test, the court of appeals below should have decided that Mr. Prevetire was engaged in maritime employment (Fed.Brf. at 9). However, it is interesting that the Solicitor General argues on the one hand that the decision below is not in conflict with this Court's decision in *Schwalb*, yet, on the other hand, concludes that the decision below was erroneous because the decision in

Schwalb, as interpreted, would extend coverage under the Act to Mr. Prevetire. There is an implicit conflict between the decision below and this Court's decision in *Schwalb* which must be remedied by this Court.

The court of appeal's decision was admittedly erroneous and its impact on the administration of the LHWCA is evident. The decision below restricts the jurisdictional requirements of the Act by concluding that a claimant involved in an activity essential or integral to the shipbuilding or ship repair process is not engaged in maritime employment. If Congress had intended to exclude such employees from coverage under the Act, it would not have included these specific activities in Section 2(3) of the Act. 33 U.S.C. §902(3) ("any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and ship-breaker"). The fact is that the decision below was simply wrong, and when the court of appeals denied coverage to Mr. Prevetire, the decision gave rise to an implicit conflict with this Court's opinion in *Schwalb*. The impact of that wrong decision is certain, for future claims within the Fourth Circuit and within the other circuits will be held to the same stringent standard that was required below. This Court must review the court of appeal's admittedly erroneous decision.

III. The Fourth Circuit's decision below remains in direct conflict with the decision of First Circuit in *Graziano*.

The Solicitor General and Respondent Employer argue that the decision below is not in conflict with the First Circuit's decision in *Graziano v. General Dynamics Corp.*, 663 F.2d 340 (1st Cir. 1981). In discussing the merits of *Graziano*, the Solicitor General asserts that the issue in

Graziano is different than in Prevetire's claim. The Solicitor General argues that the First Circuit considered whether an employee involved in the maintenance and repair of shipyard buildings and equipment was engaged in maritime employment, whereas the Fourth Circuit in the present case considered whether "a pipefitter 'employed in only the *construction* of a power plant (as distinguished from its later operation or maintenance)' met the status requirement." (Fed.Brf. at 11) (court's emphasis). However, this distinction between "construction" and "maintenance/repair" is not supported by the LHWCA, the well established case law interpreting the Act, nor by common sense. Indeed, the Fifth Circuit held in *Trotti & Thompson v. Crawford*, 631 F.2d 1214, 1220 (1980), that the initial construction of a pier cannot be distinguished from pier repair work for purposes of determining the maritime nature of employment. In addition, the Solicitor General even agreed that there is not a supportable distinction between construction and repair (Fed.Brf. at 12). Since there is no valid distinction between construction and maintenance/repair, the Solicitor General's argument here is without merit, and the conflict between *Graziano* and the decision below remains.

Respondent Employer also attempts to discredit the apparent conflict between the Fourth Circuit's decision below and the First Circuit's decision in *Graziano*. Respondent Employer cites to First Circuit's language in *Graziano*:

> [t]he maintenance of the structures housing shipyard machinery and in which shipbuilding operations are carried on is no less essential to shipbuilding than is the repair of the machinery itself . . . Graziano's maintenance and repair of shipyard facilities was essential to the building and repairing of ships . . .

> [T]he shipbuilding process would not have come to an immediate halt if Graziano's duties were not successfully discharged, but the failure to perform routine maintenance would have led eventually to a stoppage or curtailment of shipbuilding and repairs.
>
> (Respondent Employer's Brief "Emp.Brf" at 10).

Applying this rationale to the present case, Respondent Employer argues that "[t]he failure of Prevetire to perform the work in question would not have led to either a stoppage or a curtailment of the shipyard's operations." (Emp.Brf. at 10). Respondent Employer then concludes that Prevetire's work was not essential to the traditional maritime activities of shipbuilding, ship repair, or loading and unloading of ships, and therefore not entitled to coverage under the LHWCA.

Respondent Employer's conclusion in this regard is based upon an inaccurate statement of the facts. The evidence in the record indicates that the new power plant Prevetire was constructing was to replace the already existing but obsolete power generating facility. The older power plant was on its "last legs" and would have been ultimately shut down. The deposition of Mr. Durwood Curling, Executive Director of the Southeastern Public Service Authority, was part of the record before the Administrative Law Judge, the Benefits Review Board, and the Fourth Circuit Court of Appeals. Mr. Curling testified that the power generating facility at the shipyard was "outdated" and an "old, obsolete oil-fired power plant" (Court of Appeals' Appendix at 37). In addition, the deposition of Mr. Larry L. Howell, President of Weyher/Livsey Constructors, Inc., was part of the record. Mr. Howell specifically testified that "the

old plant was on its last legs and soon to be shut down and this plant would replace it." (Court of Appeals' Appendix at 17). Despite Respondent Employer's mischaracterization of the facts, the evidence indicates that the old power plant needed to be replaced, and therefore Prevetire's duties in constructing the new, more efficient power generating facility were essential to the ongoing operations at the shipyard. The failure of Prevetire to perform the work in question would certainly have led either to a stoppage or a curtailment of the shipyard's operations. It is, thus, evident that the opinion below remains in conflict with the decision in *Graziano* which must be clarified by this Court.

IV. The Fourth Circuit's decision below remains in conflict with its own prior decision in *Stewart/Joyner*.

Respondent Employer maintains that the decision in *Stewart v. Brown and Root, Inc.*, 7 BRBS 356 (1978), *aff'd. sub nom. Brown v. Joyner*, 607 F.2d 1087, 11 BRBS 86 (4th Cir. 1979), *cert. denied*, 446 U.S. 981 (1980), is not in conflict with the decision below. Respondent Employer contends that since the claimants in *Stewart/Joyner* were engaged in building a dry dock, the Fourth Circuit concluded that they were engaged in maritime employment. Respondent Employer cites to the *Stewart/Joyner* decision:

> We have held, under the earlier version of the Act, that employees building and repairing dry docks are engaged in maritime employment.
>
> (Emp.Brf. at 12).

In posing this argument, Respondent Employer has

mischaracterized the facts in *Stewart/Joyner*. The employer involved in that case, Brown & Root, Inc., was contracted by Newport News Shipbuilding to construct an entire addition to the shipyard. The expansion project did not include merely building a new dry dock, rather it included the construction of an administration building, a fabrication shop, a permanent dry dock, and other related areas such as craneways and assembly areas. To say that the court below in *Stewart/Joyner* only considered the construction of a dry dock is a misrepresentation of the facts. The truth is that Brown & Root was contracted to build an entire North yard of the shipyard. Respondent Employer is trying to narrowly read that case to avoid the obvious conflict created by the decision below.[1]

Respondent Employer also maintains that the court's decision in *Stewart/Joyner* differs from the decision below because the claimants in the former case were constructing a "traditional maritime facility", whereas the claimant in the present case was construction a power plant, "which is not a traditionally maritime facility." (Emp.Brf. at 13).
However, there is clearly an analogy between the support buildings and the shops constructed by Brown & Root and the power generating facility constructed by Weyher/Livsey in the present case. The new power plant, which sits along side those types of support buildings constructed in *Stewart/Joyner*, runs the entire Norfolk Naval Shipyard.

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[1] The Solicitor General also attempts to distinguish these two conflicting decision based on the idea that *Stewart/Joyner* involved a "dry dock" (Fed.Brf. at 13). As indicated above, Brown & Root was contracted to build an entire part of the shipyard, including fabrication shops, administration buildings, craneways and assembly areas. The distinction suggested by the Solicitor General is not based on an accurate reading of the facts.

How does one make a distinguish building the power plant in question, which is located a couple 100 yards from these buildings and which directly supplies power to the entire shipyard, from building a structure that simply houses employees doing fabrication work? How is one building structure more or less integral to the overall shipyard operations or more or less maritime in nature? It is a non-sensical distinction that is being drawn between the two.

Furthermore, building structures are not inherently maritime. If the same fabrication shop which was constructed in *Stewart/Joyner* at Newport News Shipyard was moved to Ohio and steel office furniture was being built, there would not be jurisdiction under the LHWCA. Likewise, if the same administration building which was constructed in *Stewart/Joyner* was moved to a steel yard in Ohio, there equally would not be jurisdiction under the LHWCA. The "inherent" qualities of the building are illusive when detached from the purpose to which the structure is to be put. There is nothing "inherently maritime" about a fabrication shop that would distinguish it from a power generating plant. It is a building which by its use and location is an essential part of and integral to the overall shipyard operations. The work being performed is "maritime work" because it involves the shipbuilding process. Equally, the primary purpose of the power plant in question was to run the entire shipyard, to supply the power to the shipyard, which included the administration buildings, the offices, the shops, and the dry docks. The power plant in the present case is inextricably integrated to the ongoing process of shipbuilding and ship repair. Take it away and the maritime work stops.

The Fourth Circuit's decision in *Stewart/Joyner* is clearly at odds with the decision below. It was specifically

held in *Stewart/Joyner* that:

> For future application of the "status" test, at least those persons directly involved in the **construction**, repair, alteration or maintenance of harbor facilities (which include docks, piers, wharves and adjacent areas used in the loading, unloading, repair or construction of ships) will be deemed "harborworkers" within the meaning of Section 2(3) of the Act.
>
> 7 BRBS at 365 (emphasis supplied).

The fact remains that the decision in the present case is irreconcilably in conflict with *Stewart/Joyner*. The Solicitor General asserts that it is primarily the duty of the court of appeals to resolve its internal difficulties (Fed.Brf. at 12). However, review by this Court may be granted to resolve the admittedly erroneous decision below and indisputable conflict contained therein. *See generally Cafeteria & Restaurant Wkrs. U., Local 473 v. McElroy*, 284 F.2d 173, 190-191, n.8 (D.C. Cir. 1960), citing *Hearing and Rehearing Cases In Banc, D.C.*, 14 F.R.D. 91, 96-97.

CONCLUSION

For these reasons, and for the reasons stated in the initial brief of Petitioner, this petition for a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED,

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